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EX PARTE

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MAR 27 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 27, 1996

EX PARTE

Mr. William Caton
Secretary
Federal Communications Commission
1919 M. Street N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 94-97, Written Ex Parte of SWBT

SWBT, in accordance with Section 1.1206(a)(1) of the Commission's Rules, respectfully submits the attached written Ex Parte in CC Docket No. 94-97. An original and two copies of the ex parte submission are provided.

Sincerely,

A handwritten signature in cursive script that reads "Chris Jines".

Attachment

Ms. Jines
LH/AM/OC

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March 27, 1996

EX PARTE

Ms. Suzan Friedman
Attorney
Federal Communications Commission
1919 M. Street N.W., Room 518
Washington, D.C. 20554

Re: CC Docket No. 94-97 Written Ex Parte of SWBT

Dear Ms. Friedman,

At your request, SWBT has reviewed the attached Nondisclosure Agreement and continues to believe that the Nondisclosure Agreement will not provide the necessary protection for SWBT's competitively sensitive data and, in fact, as is evident in the examples included herein even the Protective Order does not offer the level of protection needed in a competitive setting.

In the original Protective Order (Order), released on November 1, 1994, the Bureau denied requests for public release, but conditionally granted several Freedom of Information Act (FOIA) requests seeking access to itemized equipment and overhead costs included in SWBT's virtual collocation tariff filing. Because the Bureau ruled that SWBT's cost data must be disclosed to all parties to the virtual collocation tariff review proceeding, and because disclosure of this data would have resulted in competitive harm to SWBT and its vendors, SWBT filed an Application for Review of the Order on November 16, 1994.

In its review of the Nondisclosure Agreement (Agreement), SWBT compared the Agreement to the Order and found the same deficiencies that prompted SWBT to seek review of the original order.

SWBT is concerned that even a Protective Order may not provide the level of protection it promises. In fact, SWBT's concern regarding the Agreement and the Order arises in part from violations of similar Protective Orders by the State Commissions involving SWBT's highly sensitive and confidential data. For example, in a very recent proceeding before the Missouri Public Service Commission, confidential and proprietary SWBT information was distributed and

used in violation of a valid Protective Order. In accordance with a Protective Order issued by the Missouri Commission, SWBT had categorized data such that it was only to be made available to counsel and the outside experts of Sprint, the requesting party. Beyond any in-house counsel, internal personnel of Sprint were prohibited from access to the information. Although SWBT could have required Sprint representatives to view the highly confidential data on SWBT premises, SWBT provided a copy to Sprint for use as authorized by the Protective Order. However, when the testimony of an internal Sprint witness was later pre-filed, his testimony referenced some of that highly confidential and restricted data. After being specifically asked in data requests whether the internal witness had viewed the highly confidential information, the witness admitted that he had received copies of all the highly confidential information and had held the information for weeks.

Another serious breach of the Protective Order occurred in Docket No. 9960 in Texas, where an employee of a consultant to CENTEX Telemanagement, Inc., (CENTEX) was found to have misappropriated SWBT's highly sensitive confidential information by copying information from a database clearly marked as "Highly Sensitive Confidential Information" and taking the information from SWBT's premises to California where a paper copy of the information was made. This misappropriation of data was contrary to the express language of a Protective Order issued by the State of Texas which CENTEX and its consultant had agreed to follow both orally and in writing. This information has immense value to SWBT, and to companies who compete with SWBT and to telecommunications consultants. Although the Texas PUC granted SWBT's Sanctions against the Party and prohibited the consultant from testifying in that docket, the damage was already done and was irreversible.

In yet another recent example, an employee of an IXC requested a conference call with SWBT to express the IXC's expectations for changes to access rates in SWBT's annual filing. During the conference call, the employee of the IXC explained that certain services should be priced based on cost and since the employee is involved in a docket before the Texas PUC, he would be able to tell if SWBT is pricing in the expected range. Indeed, this employee had filed expert testimony in the Texas docket and had signed a protective agreement not to use the information obtained in the Texas docket anywhere outside that particular Texas docket.

The preceding examples are cases where interested parties were given restricted access to confidential and proprietary SWBT data for a limited purpose and used the data beyond the purpose for which it was intended. In each case, these parties sought to review cost and demand data to consider the appropriateness of proposed rates. However, in today's competitive environment, these concerned customers are generally also competitors. As competitors, these very same parties have a great incentive to use the highly confidential data as a means to better compete against SWBT, and some have clearly violated orders and agreements. Once SWBT's price floor and demand distribution is known, competitors can use the data to determine exactly where to deploy competing services and what price would undercut SWBT's prices.

These examples confirm SWBT's concerns that even the terms of a Protective Order can be and, in fact, are violated. Although SWBT draws no conclusion from these episodes regarding the conduct of Sprint, CENTEX or the IXC, there remains the basic, inescapable fact that SWBT's highly sensitive restricted information was disclosed in violation of a lawful obligation to maintain its confidentiality. These recent breaches affirm the risk forced upon SWBT whenever

its confidential data is made available to third parties. Although SWBT's experience is that nothing guarantees compliance with any Protective Order (See Inquiry into Alleged Violations of Protective Order Issued in Docket No. 6200, Texas Public Utility Commission, Docket No. 6451, 11 Texas PUC Bulletin 585 (1986), where AT&T was found to have violated a Protective Order and ultimately subjected to a civil fine), SWBT reasonably seeks to restrict access to its proprietary and competitively sensitive information to the greatest extent possible in order to minimize that risk.

SWBT is lawfully entitled to have its competitively sensitive information withheld from its competitors. In addition, with the implementation of the Telecommunications Act of 1996 which facilitates the growth of competition in every aspect of the telecommunications market, the Commission must agree that more stringent protection of competitive information is needed, not less. As such the real solution to the problem is not to file under the FOIA or to operate under a Protective Order. Rather cost support requirements as a basis for establishing the reasonableness of rates should be eliminated. The Commission should allow the competitive market forces drive the reasonableness of rates consistent with the intent of the Telecommunications Act of 1996.

Please call me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Chris Jones".

Attachment

CC: Judy Nitsche
Jim Lichford
Jim Schlichting

Nondisclosure Agreement

1. This nondisclosure and protective agreement (the "Agreement") is effective this ____ day of ____, 1996, by and between Bell Atlantic-New Jersey, Inc. and its counsel of record ("Bell Atlantic") and _____ (the party seeking access) and its counsel of record in all phases of the investigation of the competitively sensitive aspects of Bell Atlantic's tariff for commercial video dialtone service in Dover Township, New Jersey (Transmittal Nos. 741, 786), including administrative and judicial review. Materials subject to this Agreement may not be disclosed after conclusion of the tariff investigation and must be returned to Bell Atlantic.

2. Whereas, _____ (the party seeking access) has requested that Bell Atlantic provide certain vendor pricing information that was redacted in preparing the referenced transmittals, and Bell Atlantic has agreed to make such vendor pricing data available to parties to the investigation, subject to the protection of a nondisclosure agreement;

3. Whereas, the information requested by _____ (the party seeking access) constitutes competitively sensitive commercial and financial information of Bell Atlantic and its vendors;

4. Accordingly, the parties hereto and their counsel agree that the following terms and conditions shall govern the use of such information provided to _____ (the party) by Bell Atlantic in the context of this proceeding;

5. For purposes of this agreement, "competitively sensitive information" means commercial information or trade secrets, within the meaning of 5 U.S.C. § 552(b), which Bell Atlantic redacted in its May 5, 1995 filing in this proceeding;

6. Competitively sensitive information disclosed to _____ (the party) under the terms of this Agreement shall be segregated from material deemed non-competitively sensitive;

7. Competitively sensitive information may be disclosed to:

(a) counsel, including in-house counsel, actively engaged in representing _____ (the party) with regard to participation in this tariff investigation proceeding, and such counsel's regulatory analysts, paralegals and clerical staff, to the extent reasonably necessary to render

professional services in this proceeding; provided that such counsel, regulatory analysts, paralegals and clerical staff (i) are not representing, advising or otherwise assisting, directly or indirectly, providers of video delivery products or services in devising plans to compete against Bell Atlantic Corporation, its affiliates or subsidiaries, or against BroadBand Technologies, Inc., a vendor to Bell Atlantic for this service; and (ii) are not now engaged and do not contemplate being engaged in the purchase of similar or identical equipment or equipment substitutable in whole or in part for the equipment whose prices are contained in the cost support data covered by this Nondisclosure Agreement; and

(b) any non-employee of _____ (the party) requested by _____ (the party) to furnish technical or other expert services, or otherwise to prepare material, for the investigation of the tariff that is the subject of this proceeding; provided that such persons are not representing, advising or otherwise assisting, directly or indirectly, providers of video delivery products or services in devising plans to compete against Bell Atlantic Corporation, its affiliates or subsidiaries, or against BroadBand Technologies, Inc., a vendor to Bell Atlantic for this service.

8. Disclosure of confidential information shall be limited to persons ("authorized recipients") who sign the Access Agreement, annexed as Attachment A, stating that they have read this Agreement and consent to be bound by its terms. Authorized recipients may make arrangements to view the confidential information at Bell Atlantic's office at 1133 20th Street, N.W., Washington, D.C., by contacting Marie Breslin at (202) 392-6990.
9. The documents and computer disks containing material which is subject to this Agreement shall be marked: "Contains designated competitively sensitive material of Bell Atlantic." In the event any additional designated material is provided to signatories pursuant to this Agreement, it shall be similarly identified in supplemental attachments.
10. Any competitively sensitive information produced, revealed or disclosed to counsel or outside experts or consultants by Bell Atlantic in this proceeding shall be used exclusively for purposes of participating in this proceeding, including any appeals, and shall not otherwise be used or disclosed for any other purpose. The limitation on the use or disclosure of any competitively sensitive information disclosed during this proceeding shall be construed to prohibit disclosure of the competitively sensitive

information, and to prohibit making decisions, participating in any decision-making processes, or rendering advice, legal or otherwise, wherein any information or knowledge derived from such competitively sensitive information is utilized in any manner other than for purposes of this proceeding.

11. _____ (the party) may, in any pleading it files in this proceeding, reference the competitively sensitive information disclosed under this Agreement, but only if it observes the following procedures:

(a) Any portions of the pleading that contain competitively sensitive information are physically segregated from the remainder of the pleading;

(b) The portions containing competitively sensitive information are plainly marked as such and delivered in sealed envelopes to William F. Caton, Secretary, Federal Communications Commission, for filing under seal, and to other recipients authorized to have access under this Nondisclosure Agreement and the Commission's rules. Information so provided shall be maintained by the Commission and all recipients in sealed envelopes or containers and a statement in the following form placed on such envelope or container:

THIS ENVELOPE IS NOT TO BE OPENED NOR THE CONTENTS THEREOF TO BE DISPLAYED OR REVEALED EXCEPT PURSUANT TO THE NONDISCLOSURE AGREEMENT AUTHORIZED IN CONNECTION WITH BELL ATLANTIC'S TARIFF TRANSMITTAL NOS. 741 AND 786;

(c) Each page of the filing that contains competitively sensitive information subject to this Agreement is clearly marked: "Competitively sensitive pursuant to Nondisclosure Agreement entered into on _____, 1996;" and

(d) The competitively sensitive portion of the pleading shall be served only upon the Commission and Bell Atlantic, unless the Chief of the Common Carrier Bureau directs otherwise.

12. Disclosure of materials described herein shall not be deemed a waiver by Bell Atlantic or any vendor in any other proceeding, agency or court, of any privilege or entitlement to competitively sensitive information that could be raised. _____ (the party), as a condition to viewing the competitively sensitive information subject to this Agreement, agrees:

- (a) Not to assert any such waiver;
 - (b) Not to use information derived from review of any competitively sensitive materials to seek disclosure in any proceeding other than the Dover tariff investigation; and
 - (c) That accidental disclosure of competitively sensitive information shall not be deemed a waiver of the privilege.
13. In the event that any competitively sensitive information is released or otherwise becomes publicly available other than as a result of a violation of this Agreement or other unlawful means, the nondisclosure provisions of this Agreement shall cease with respect to such competitively sensitive information, but shall remain in full force and effect as to the competitively sensitive materials not so released or made publicly available.
14. Counsel may request Bell Atlantic to make one copy of competitively sensitive information (of which counsel must acknowledge receipt pursuant to this Agreement), and counsel may thereafter make additional copies but only to the extent required and solely for preparation and use in the Dover tariff investigation, and provided further that all such copies shall remain in the possession and custody of counsel at all times. Competitively sensitive information may not be provided or disclosed in any manner by the Commission or any authorized recipient hereunder to any individual with operational responsibilities at any party or intervenor or to anyone else whatsoever except those designated as permissible recipients hereunder. Counsel shall make no further copies of any competitively sensitive information or portions thereof but shall return to Bell Atlantic immediately after the final decision in the Dover tariff investigation (including any administrative or judicial review thereof) all competitively sensitive information originally provided by Bell Atlantic as well as copies made, and shall certify that no quotes or excerpts from such competitively sensitive information have been retained by any person having access.
15. Upon conclusion of the Dover tariff investigation, including any appeals that may be taken, the competitively sensitive information other than the competitively sensitive information that has been made part of the formal record in this proceeding in accordance with paragraph 11 hereof, shall be returned to Bell Atlantic, or shall be destroyed pursuant to written permission from Bell Atlantic. Upon conclusion of this proceeding, notes, memoranda or other

written material of any kind containing competitively sensitive information or summaries or compilations of the whole or any part thereof (other than those which constitute attorney work products) shall be tendered to Bell Atlantic or shall be destroyed pursuant to written permission from Bell Atlantic.

16. This Agreement shall continue in full force and effect until the Dover tariff investigation, including all administrative and judicial appeals, has ended and _____ (the party) has complied fully with the terms of this Agreement.
17. Notwithstanding the expiration of this Agreement at the end of the proceedings, the terms and conditions of this Agreement shall continue to apply to any competitively sensitive information provided by Bell Atlantic to _____ (the party) hereunder.
18. This Agreement shall benefit and be binding upon the parties hereto, their counsel, and each of their respective heirs, successors, assigns, affiliates, subsidiaries, and agents.
19. Any failure to abide by the terms of this Nondisclosure Agreement may result in the imposition of sanctions, including dismissal of a party's petitions or comments, or censure, suspension or disbarment of the attorneys involved. See 47 C.F.R. § 1.24.
20. This agreement shall be governed in accordance with the laws of the Commonwealth of Virginia.

[PARTY]

Signature

(Print name)

Business address

Business telephone

Date signed

BELL ATLANTIC

Signature

(Print name)
Business address

Business telephone

Date signed
Attachment A

Access Agreement

I, _____ (print name), _____
(print title), an employee, office, director, shareholder, agent,
consultant, expert witness (circle appropriate response) of
_____ (name of firm), located at
_____ (address), hereby acknowledge
that I have received and read a copy of the Nondisclosure
Agreement effective _____, 1996 between Bell Atlantic and
_____ name of party) in connection with the
investigation of Bell Atlantic tariff Transmittal Nos. 741 and
786.

I understand and agree to be bound by all of the terms
and provisions of the Nondisclosure Agreement. I further state
that neither I nor any firm with which I am affiliated will use
any competitively sensitive information (as defined in the
Nondisclosure Agreement) to which I obtain access pursuant to
that Agreement in connection with the development of any
strategies or plans of any firm, person or entity to compete with
Bell Atlantic, and that I will use said competitively sensitive
information exclusively for the purpose of participating in the
Dover tariff investigation, including any administrative and
judicial appeals.

Dated: _____, 1996

Signature

Name

Address

Telephone